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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, INC.,
Petitioner,

v.

STATE OF SOUTH CAROLINA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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Dated: February 11, 1993

QUESTION PRESENTED

Did the Court of Appeals properly review the affidavits and other materials supporting the district court's grant of summary judgment to those defendants who attested that they met the South Carolina standard for adverse possession because they held and possessed their property under claim of title, paid taxes and took steps to protect the property from trespassers, and the plaintiff did not present any evidence suggesting that there was a genuine issue of material fact as to whether the defendants had possessed the property?

PARTIES IN THE COURT OF APPEALS

Fifty-two defendants were granted summary judgment by the district court.* Although the district court's order resolved less than all the claims, the district court made its order appealable pursuant to Fed. R. Civ. P. 54(b). The plaintiff is "The Catawba Indian Tribe, Inc.," a non-profit organization incorporated in 1975 under South Carolina law and operated by persons alleged to be descendants of Catawba Indians.

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* The defendants who received summary judgment for some or all of their property are: the State of South Carolina; City of Rock Hill; Bowater Carolina Corporation; Celanese Corporation of America; Citizens and Southern National Bank of South Carolina; Crescent Land & Timber Corp.; Duke Power Company; Herald Publishing Company; Southern Railway Company; Springs Mills, Inc.; Wachovia Bank and Trust Company; Ashe Brick Company; Church Heritage Village & Missionary Fellowship; C.H. Albright, Ned Albright; John Wesley Anderson, David Goode Anderson; Elizabeth Ardrey Grimball, John W. Ardrey, Ardrey Farms; F.S. Barnes, Jr.; Archie B. Carroll, Jr.; Lillian Crandall Close, Francis Ellison Close, Leroy Springs Close, Patricia Close, William Elliot Close, Hugh William Close, Jr.; Robert A. Fewell; Annie F. Harris; T.W. Hutchinson, Hiram Hutchinson, Jr.; F.M. Mack, Jr.; Arnold F. Marshall; Will R. Simpson, John S. Simpson, Robert T. Simpson; Thomas Brown Snodgrass, Jr.; John M. Spratt; Marshall E. Walker; Hugh M. White, Jr.; John M. Belk; Jane Nisbet Goode, R.N. Bencher, W.O. Nisbet III; J. Max Hinson; W.A. McCorkle, Mary McCorkle; William O. Nisbet; Eugenia Nisbet White, Mary Nisbet Purvis, E.N. Martin.

A Rule 29.1 listing of the parent companies and subsidiaries of defendant corporations in the district court is attached as an appendix.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

I. THE PROCEEDINGS BELOW AND THE ISSUES FOR REVIEW.

Petitioner is a non-profit organization incorporated in 1975 under South Carolina law. This organization contends that a voluntary sale by the Catawbas of the lands in issue pursuant to an 1840 treaty with the State of South Carolina was invalid and that it retains the right to void the 1840 transaction. According to the Catawbas, a federal statute known as the Nonintercourse Act [1] re-

[1] The Nonintercourse Act, first enacted in 1790 and most recently modified in 1834, is presently codified at 25 U.S.C. § 177 (1976). The term refers to restrictions on the alienation of Indian lands contained in a series of more comprehensive acts regulating Indian affairs, each known as the "Indian Trade and Intercourse Act."

Jurisdiction in the district court was asserted pursuant to 28 U.S.C. §§ 1331, 1337 and 1361.

quired federal approval or consent to this voluntary sale, and such federal approval or consent was lacking.

In *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 511 (1986); Pet. App. 172a, 187a, this Court held that the Catawba termination act, 25 U.S.C. §§ 931-938, "requires the application of the state statute of limitations to the [Catawbas'] claim." However, "[b]ecause the Court of Appeals is in a better position to evaluate such an issue of state law," the case was remanded to the Court of Appeals for a review of the district court's holding that the statute of limitations completely barred the claim. *Id.*

Upon remand, the district court's original grant of summary judgment was partially affirmed by the Court of Appeals and remanded for further proceedings. *Catawba Indian Tribe of South Carolina v. State of South Carolina*, 865 F.2d 1444 (4th Cir. 1989) (en banc), *cert. denied*, 491 U.S. 906 (1989), Pet. App. 132a. In doing so, the Court of Appeals held that the district court properly entered summary judgment dismissing the plaintiff's claims against any named defendant

> who holds and possesses property that has been held and possessed adversely to the tribe's legal title for ten years after the revocation of the tribe's constitution, July 1, 1962, and before the commencement of this action, October 20, 1980, without tacking except by inheritance.

Id. at 1446, Pet. App. 133a.[2]

Following remand to the district court, a number of the respondents filed a supplemental brief in support of their original summary judgment motion, together with supporting affidavits, demonstrating that they had "held

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[2] In its recent opinion, the Court of Appeals noted that "[t]he complaint actually was filed on October 28, 1980. Therefore, the defendants had until October 28, rather than October 20, to fulfill the ten year requirement." Opinion, Pet. App. 7a n.4.

and possessed adversely" for the requisite ten-year period without tacking. After an exchange of briefs, further affidavits presented by both sides and two lengthy hearings, the district court entered summary judgment in a series of four Judgment Orders, dismissing the plaintiff's claim as to certain parcels of land. *Catawba Indian Tribe of South Carolina v. State of South Carolina*, No. 80-2050 (D.S.C. July 18, 1990) (unreported); Pet. App. 104a-131a. To the extent that it appeared that those parcels included all of the land in the claim area of a named respondent, the named respondent was dismissed as well.

The Catawbas appealed all four of the Judgment Orders to the Court of Appeals which, after detailed examination of all the affidavits, affirmed in part and reversed in part. *Catawba Indian Tribe v. South Carolina*, No. 90-2446 (4th Cir. September 22, 1992) (en banc) ("Opinion"), Pet. App. 1a-103a. Following a review of South Carolina adverse possession precedent, the Court of Appeals concluded that each moving landholder must demonstrate "actual, open, notorious, hostile, continuous and exclusive possession." Opinion (citing *Crotwell v. Whitney*, 229 S.C. 213, 92 S.E.2d 473, 477 (1956)), Pet. App. 9a-10a. Applying that standard to the circumstances of this case, the court held that a respondent who produces evidence, by affidavits or otherwise, that "he or a predecessor held the record title to the property, possessed, occupied, or held the property, paid taxes on the property, and took steps to protect the property from trespassers" for the requisite period would meet the requirements of adverse possession under South Carolina law and the burden under Rule 56 of the Federal Rules of Civil Procedure. Opinion, Pet. App. 11a.

The Court of Appeals found, as to the parcels which it affirmed, that the affidavits submitted by the moving respondents were sufficient in this respect. The Court of Appeals determined that, in order to avoid summary judgment, the Catawbas were required to set forth by affidavit or otherwise specific facts showing that there is

a genuine issue for trial, a burden they had not met. Absent a showing that "there is a dispute as to whether a [respondent] claimant did those things claimed in the affidavit," the Court of Appeals found there was no "material issue of fact" and summary judgment was properly granted.[3] Opinion, Pet. App. 14a. Applying these principles, the court reviewed the record facts for each of the properties placed in issue by each of the moving respondents. Opinion Appendix A, Pet. App. 37a-103a.

II. STATEMENT OF FACTS.

The only facts relevant to this appeal concern the possession of the parcels in issue during the period from July 1, 1962 to October 28, 1980. Those facts, which are unique for each parcel, are set forth in the voluminous affidavits and title documents filed in the district court and reproduced in the record before the Court of Appeals.

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision does not warrant review. The unanimous en banc decision below affirming the district court reflects the considered and careful judgment of the Court of Appeals regarding the application of the adverse possession law of South Carolina.

As a result of this Court's earlier decision, *Catawba*, 476 U.S. 498, and the Court of Appeals' subsequent en banc decision, *Catawba*, 865 F.2d 1444, the only issue before the Court of Appeals was the state law question of whether the landholders adversely possessed various par-

[3] The Court of Appeals ruled as well on a number of other issues raised by petitioner in its appeal from the Judgment Orders, remanding some of the parcels for further hearings. Opinion, Pet. App. 15a-35a. However, the petition for certiorari does not address them and does not present them as questions for review.

cels between 1962 and 1980.[4] The moving respondents filed hundreds of pages of affidavits and related documents demonstrating that they held record title to and possessed the parcels on which they moved for at least ten years without tacking between 1962 and 1980. Except for one parcel, the Catawbas presented no facts—much less facts which even hint that there could be any genuine issue of material fact—concerning these properties. Instead they attacked the form of almost every affidavit, contending, for example, that affidavits describing a hundred year old college or farms worked for generations did not sufficiently establish adverse possession. According to the Catawbas, a landholder's expression of the fact that he possessed or used the property was deficient because it was expressed in a way the Catawbas strained to label as vague or conclusory.

This effort to substitute argument for evidence was properly rejected by the Court of Appeals which held that once a landholder had established sufficient facts to sustain a motion for summary judgment in his favor, the burden shifted to the petitioner to establish that there was a "material issue of fact." The petition's real challenge is not to the legal standard applied by the Court of Appeals, but rather to the factual basis for the district court's and the Court of Appeals' conclusions. The numerous affidavits and related documentation of record title which were individually reviewed by the Court of Appeals amply support the court's conclusions. A con-

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[4] The Catawbas, seeking to obtain land they admittedly have not "actually occupied and enjoyed" for well over a century, pled that the defendants "are keeping" them "out of possession" and, indeed, that the defendants and their predecessors have committed "trespass . . . for the entire period of dispossession." Complaint ¶¶ 19, 22, 1. It is, therefore, undisputed that the subject lands have been conveyed, used and possessed by persons other than the Catawbas for the past 150 years in the same manner as other real property anywhere else and that the Catawbas were well aware that others possessed and claimed the property.

troversy such as this, involving state law and based purely on differing assessments of the facts, is not appropriate for review by this Court.

I. THE COURT OF APPEALS CORRECTLY APPLIED THE SOUTH CAROLINA LAW OF ADVERSE POSSESSION.

A. The Court of Appeals' Formulation of the Legal Standards for Adverse Possession Accurately Reflects South Carolina Law.

South Carolina long ago established that adverse possession "is the actual occupation . . . of land as one's own." *Sumner v. Murphy*, 9 S.C.R. (2 Hill) 488, 495 (1834) (quoting *Simmons v. Parsons*, 9 S.C.R. (2 Hill) 492 (1829)); *accord*, *Sudduth v. Sumeral*, 61 S.C. 276, 39 S.E. 534, 539 (1901) (quoting *Gray v. Bates*, 14 S.C.R. (3 Strob.) 498, 502 (1849)). The Court of Appeals held that a landholder meets this requirement if he produces affidavits or other sufficient documents establishing that "he or a predecessor held the record title to the property, possessed, occupied, or held the property, paid taxes on the property, and took steps to protect the property from trespassers" for the requisite period of time. Opinion, Pet. App. 11a. This holding correctly stated the South Carolina law of adverse possession.

In South Carolina, one who possesses land other than the legal title holder is presumed to be possessing that land adversely. In *Mullis v. Winchester*, 237 S.C. 487, 118 S.E.2d 61, 66 (1961), the South Carolina Supreme Court stated that "[a]s a general rule, the law presumes that the exclusive possession of land by one who is a stranger to the holder of the legal title is adverse." Applying the rule of *Mullis*, the Court of Appeals determined that, if the Catawbas were assumed to hold legal title to the property they seek, any person other than the Catawbas who possessed the property would be a stranger

to the holder of legal title and presumed to be holding adversely. Opinion, Pet. App. 12a.

Moreover, when "a person goes into possession of land under a deed from a third person which purports on its face to convey to him an absolute and exclusive title to the entire interest in the land, and such deed is spread upon the public records, this is notice to the world that he is claiming the entire and exclusive interest in the land, and his possession may be adverse to all the world from the time of its commencement." *Sudduth v. Sumeral*, 61 S.C. 276, 39 S.E. 534, 539 (1901); *see also Epperson v. Stansill*, 64 S.C. 485, 42 S.E. 426, 427 (1902) ("possession is adverse when it is under claim of right"). Applying this authority, the Court of Appeals appropriately concluded that the elements of adverse possession would be satisfied under South Carolina law when a landholder established continuous possession of a parcel of property under color of title.

The Court of Appeals' formulation of the legal standards for adverse possession, affirming those utilized by the district court below, accurately reflects the law of South Carolina. The petitioner's claims that the Court of Appeals fashioned "new standards" for this case, Petition at 8, simply ignores the South Carolina law carefully applied by the Court of Appeals.

B. The Court of Appeals Correctly Determined That The Affidavits Submitted By The Landholders Adequately Establish Possession Under South Carolina Law.

The petition asserts that the Court of Appeals found affidavits concluding, in essence, "I was in possession" sufficient to meet respondents' initial burden and to shift to the petitioner the burden of demonstrating evidence of a genuine issue of material fact. Petition at 8. That argument mischaracterizes both the standard applied by the Court of Appeals in reviewing each of the affidavits and the content of the affidavits themselves.

The standard applied by the Court of Appeals clearly required more than a mere statement of possession or occupancy by the affiant. The district court and the Court of Appeals required that the affiant establish that he had record title to the property, that he had paid taxes and that he had taken steps to protect the property from trespassers for the required period. Opinion, Pet. App. 11a. Nowhere in the petition do the Catawbas identify any affidavits involving property as to which the Court of Appeals affirmed which do not meet all of the elements of this standard.

Moreover, the Court of Appeals' review of the affidavits and of the law of South Carolina properly led it to conclude that "th[e] averments made in the affidavits are sufficient to satisfy the open, notorious, continuous, and hostile requirements." Opinion, Pet. App. 15a. In fact, the affidavits of the landholders set forth a variety of circumstances of possession comporting with the variety of different uses to which the land was put. Although the extent of the detail provided in the recitation of that possession varies from affidavit to affidavit—as might be expected given the number of different defendants and properties involved—the Court of Appeals concluded that the averments in the affidavits "are sufficient to establish possession for adverse possession purposes." Opinion, Pet. App. 14a, (citing *Mullis*, 118 S.E.2d at 65 ("acts of adverse possession 'are only required to be exercised in such way and in such manner as is consistent with the use to which the lands may be put and the situation of the property' ")).

The Catawbas' basic argument, nowhere explicitly stated but everywhere implied, is that the landholders may not "state" that they possessed the disputed property, maintained it, or protected it against trespassers, but must detail every act of possession for ten years. However, the elements of adverse possession, including possession itself, are either simple or ultimate issues of fact but in no case conclusions of law.

The Federal Rules of Evidence authorize and regard as evidence affidavits that "state" that a landholder has met the elements of adverse possession. Fed. R. Evid. 701 permits testimony by a lay witness "in the form of opinions or inferences." Fed. R. Evid. 704(a) provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rules 701 and 704 authorize lay opinions and inferences on a wide range of ultimate issues. *See Hansard v. Pepsi-Cola Metro. Bottling Co. Inc.*, 865 F.2d 1461, 1466-67 (5th Cir.) (no abuse of discretion in admitting lay opinion that the plaintiff was terminated as part of the company's "youth movement" despite the fact that the witness had no first-hand knowledge of the specific termination), *cert. denied*, 493 U.S. 842 (1989); 7 Wigmore on Evidence § 1960 (Chadbourne rev. 1978) ("If a witness, in the course of his testimony, comes to mention that A 'possessed' or B 'owned' or C was 'agent,' let him not be made dumb under the law, and be compelled by evasions and circumlocutions to attain the simple object of expressing his natural thought. If there is a real dispute as to the net effect of the facts, these may be brought out in detail on cross-examination.").[5]

The Catawbas' argument that the landholders are obligated to set forth "specific actions . . . which they con-

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[5] Lay opinions and inferences are no less admissible because they are in affidavit form. *Samples v. City of Atlanta*, 846 F.2d 1328, 1334 (11th Cir. 1988); *Paton v. La Prade*, 524 F.2d 862, 871 (3d Cir. 1975) ("Opinion testimony that would be admissible at the actual trial may be submitted in an affidavit"). In the instant case, the affiants, usually record titleholders of the property at issue, clearly had personal knowledge to speak to issues of possession, payment of taxes, and the other elements of adverse possession, and the Court of Appeals so found as to the parcels as to which it affirmed. The Catawbas had the opportunity to probe any opinions and inferences by discovery and chose not to do so. *Cf. Oksanen v. Page Mem. Hosp.*, 945 F.2d 696, 708 (4th Cir. 1991).

tended constituted an entry and a continuous possession," Petition at 11, also disregards the purpose behind the requirements of adverse possession and overlooks the Catawbas' own admissions that they had actual knowledge the respondents were occupying, controlling and claiming the disputed parcels as their own. The reason for "prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that the record title or ownership is in danger." 3 Am. Jur. 2d *Adverse Possession* § 71 (1986). *Accord Mullis*, 118 S.E.2d at 66; *see also Gregg v. Moore*, 226 S.C. 366, 85 S.E.2d 279, 281 (1954) (holding that where entry onto land was not hostile, adverse possession could not begin until notice was "brought home to the true owner"). Conversely, in *Graniteville Co. v. Williams*, 209 S.C. 112, 39 S.E.2d 202 (1946), the South Carolina Supreme Court held that actual knowledge was unnecessary if the adverse claimant's possession "was so open, visible, and notorious" that the true owner "in the exercise of ordinary diligence should have had knowledge" of the claim. 39 S.E.2d at 206. "[O]pen, hostile and notorious possession is required where the true owner is *without actual knowledge* of the hostile claim. This is the law of South Carolina and the general law of the land." *Johnson v. Pritchard*, 302 S.C. 437, 395 S.E.2d 191, 197 (Ct. App. 1990) (emphasis added).

The Catawbas' insistence that the landholders have not provided sufficient detail to establish an adverse entry and occupation is fundamentally inconsistent with specific allegations in the complaint showing the Catawbas have always been aware that the land was possessed by others. By alleging that the defendants "are keeping" the Catawbas "out of possession" and have committed "trespass . . . for the entire period of dispossession" (and, indeed, by seeking trespass damages for that 140-year period), the Catawbas have conceded their actual knowledge of

the occupation of and claim to the land by the respondents and their predecessors. (Complaint, ¶¶ 22, 1).[6]

Under these circumstances, the Court of Appeals' application of South Carolina adverse possession law to the affidavits submitted by the landholders was correct. Moreover, the Catawbas failed to respond to those affidavits with evidence showing that any genuine issues of material fact remain to be resolved.

II. THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARDS UNDER RULE 56 TO HOLD THAT THE CATAWBAS DID NOT MEET THEIR BURDEN IN OPPOSING SUMMARY JUDGMENT.

A. The Ruling Below Is Consistent With The Parties' Respective Burdens On A Motion For Summary Judgment.

The petition should be denied because the affirmance of summary judgment by the Court of Appeals was entirely consistent with the burdens imposed by Fed. R. Civ. P. 56, and the relevant decisions of this Court. The Court of Appeals explicitly recognized that *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co., Inc. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), governed the analysis of the motion. Pet. App. at 8a-9a. Rule 56 places on the moving party the initial burden to show the absence of any genuine issue of material fact. However, once that burden is met—as both courts below concluded it was here—the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475

[6] This admission by the Catawbas relieved respondents of any obligation to prove those elements going to the legal owner's knowledge that his land was being claimed by others. The party moving for summary judgment has the burden of proof on every element of his claim "except those elements *admitted by his adversary in his pleadings*, or by stipulation, or otherwise during the course of pretrial." *United States v. Dibble*, 429 F.2d 598, 601 (9th Cir. 1970) (emphasis added).

U.S. at 586. The opposing party has an affirmative burden to produce "*specific facts* showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). As the Court of Appeals has put it, "[g]enuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice. A trial, after all, is not an entitlement. It exists to resolve what reasonable minds would recognize as real factual disputes." *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Summary judgment procedure thus exists in order to resolve without trial those cases whose facts do not merit a trial. In the face of the landholders' affidavits clearly demonstrating their possession of the land, it was incumbent upon the Catawbas to produce any evidence they had which would demonstrate that there was some reason for the parties and the court to go through a trial. *See Blue Ribbon Feed Co. v. Farmers Union Cent. Exch. Inc.*, 731 F.2d 415, 419 (7th Cir. 1984) ("The purpose of summary judgment is to force the parties to show the court that trial would serve a meaningful purpose. . . . It accordingly was incumbent on [the party opposing summary judgment] to place before the court some evidentiary matter and convince the court that factual issues were genuinely in dispute").

Here, with the exception of two affidavits relating to one parcel of land,[7] the Catawbas did not even attempt to controvert the defendants' factual showing. In light of the petitioner's utter failure to produce any evidence controverting respondents' facts—let alone evidence upon which a reasonable jury could find in its favor—summary judgment was not merely proper, but required. Where there is no evidentiary basis to create a factual dispute, counsel's argument alone is not enough to defeat

[7] Those two affidavits were determined by the Court of Appeals to be insufficient to establish that the landholder's possession was other than exclusive and continuous. Opinion, Pet. App. 29a-31a.

summary judgment. *Securities and Exch. Comm'n v. Bonastia*, 614 F.2d 908, 914 (3d Cir. 1980); *see also Larry Harmon Pictures Corp. v. Williams Restaurant Corp.*, 929 F.2d 662, 663 n.1 (Fed. Cir.) (Counsel's argument that affidavit was biased, self-serving and suspect "insufficient to raise a genuine issue of material fact where there is an absence of probative evidence conflicting with" the affidavit), *cert. denied*, 112 S. Ct. 85 (1991); *Bloodgood v. Garraghty*, 783 F.2d 470, 475 (4th Cir. 1986) ("[B]are allegations of error," without any conflicting evidence to counter the moving party's affidavits, will not preclude summary judgment).[8]

The Catawbas ask this Court to forgive the consequences of their failure by arguing that the Court of Appeals erred in holding that respondents proved adverse possession by clear and convincing evidence. According to the Catawbas, no burden of production shifted to them. Pet. at 16-17. This is wrong because, as set forth *supra*, the district court and Court of Appeals correctly determined that the landholders met South Carolina's requirements for showing adverse possession. Nowhere did the Court of Appeals, as the Catawbas assert, "reject" the clear and convincing standard for showing adverse possession.

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[8] Although the opposing party may elect not to submit any affidavits or other evidence contradicting the facts set forth by the movant, he does so at his peril. *E.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161 (1970) (*quoting* 6 J. Moore, Federal Practice ¶ 56.22[2], pp. 2824-25 (2d ed. 1966)). In such a case the movant's uncontroverted facts are deemed admitted. *Kaszuk v. Bakery and Confectionary Union and Indus. Int'l Pension Fund*, 791 F.2d 548, 558 (7th Cir. 1986); *Jones v. Halekulani Hotel, Inc.*, 557 F.2d 1308, 1310 (9th Cir. 1977) (public easement by prescription established and summary judgment upheld because defendant's uncontradicted affidavits showing public use of the area "taken as true"); *see also United States v. Lot 9, Block 2 of Donnybrook Place, Harris County, Texas*, 919 F.2d 994, 998 (5th Cir. 1990) (opposing party's affidavit generally denying illegal activity but failing to controvert the specific facts alleged by the government could not defeat summary judgment for government).

The Catawbas failed to meet their burden of producing any evidence to show that there was a genuine issue of material fact remaining to be resolved. For this reason, summary judgment was properly granted and upheld by the courts below.

B. There Is No Conflict Between The Decision Of The Court of Appeals In This Case And Decisions Of Other Courts Of Appeals Concerning Affidavits Submitted On Summary Judgment.

The Catawbas attempt to manufacture a "conflict" between the Court of Appeals' holding below and decisions of other courts of appeals concerning the types of averments permissible in affidavits supporting a summary judgment motion. There is no conflict.

While certain of the cases cited by the Catawbas (Pet. at 15-16) stand for the general proposition that completely conclusory affidavits will not suffice to either support or oppose summary judgment, none conflicts with the Court of Appeals' decision here. Several of the decisions simply indicated disapproval of the particular affidavits at issue without setting forth the deficient statements, thus precluding any meaningful comparison to the landholders' affidavits.[9] Further, many of the cited cases involved attorney—not party—affidavits which were rejected because they were not based on personal knowledge.[10] Such cases are inapposite because, as the Court

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[9] *See Postscript Enter. v. City of Bridgeton*, 905 F.2d 223, 226 (8th Cir. 1990); *Toro Co. v. Krouse, Kern & Co., Inc.*, 827 F.2d 155, 162-63 & n.3 (7th Cir. 1987); *Union Ins. Soc. of Canton, Ltd. v. William Gluckin & Co. Inc.*, 353 F.2d 946, 952-53 (2d Cir. 1965).

[10] *Postscript Enter.*, 905 F.2d at 226; *Maldonado v. Ramirez*, 757 F.2d 48, 51 (3d Cir. 1985) (conclusion of continuing attorney-client relationship between plaintiff and another attorney was "conjecture" because based on examination of documents prepared by others); *Schiess-Froriep Corp. v. S.S. Finnsailor*, 574 F.2d 123, 126 (2d Cir. 1978) (attorneys' affidavits inadmissible because based solely on hearsay); *Union Ins.*, 353 F.2d at 952 (portions of attorneys' affidavits not based on personal knowledge were disregarded).

of Appeals found, the landholders' affidavits pertaining to the parcels as to which summary judgment was affirmed demonstrated that they were based on personal knowledge. Opinion, Pet. App. 15a-17a.[11]

Finally, the few cases cited by the Catawbas in which a party's rejected statements were actually described are distinguishable.[12] The rejected statements in those cases contained speculation concerning future events or ultimate conclusions of law. As such, they bear no resemblance to the affidavits herein, which recited the possession of affiants in a manner found by the courts below to be sufficiently detailed to establish adverse possession under South Carolina legal standards.

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[11] In a few instances, in fact, the Court of Appeals determined that insufficient personal knowledge was shown on the face of the affidavit and vacated and remanded. Opinion, Pet. App. 17a; Opinion Appendix A, Pet. App. 94a-97a.

[12] *May v. Department of Air Force*, 777 F.2d 1012 (5th Cir. 1985); *Aldahonda-Rivera v. Parke Davis & Co.*, 882 F.2d 590 (1st Cir. 1989); *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291 (5th Cir. 1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 11, 1993

APPENDIX

APPENDIX

STATEMENT PURSUANT TO RULE 29.1

The following lists the named defendant corporations by or on whose behalf this opposition to the petition for certiorari herein is filed, and each of their parent companies and subsidiaries (except wholly owned subsidiaries), if any:

Bowater Carolina Corporation and Catawba Timber Co. (now unincorporated divisions of Bowater Incorporated, whose non-wholly owned subsidiaries and affiliates are Catawba Newsprint Company, Bowater Mersey Paper Company Limited, and Pulpa y Papel Orinoco, S.A.)

Celanese Corporation of America (now known as Hoechst Celanese Corporation), a subsidiary whose ultimate parent is Hoechst Corporation, and whose non-wholly owned subsidiaries are:

Hoechst-Roussel Pharmaceuticals, Inc.
Hoechst-Roussel Agri-Vet Company
Hoechst Diafoil Company
Celgene Corporation
Interactive Radiation, Inc.
Codenoll Technology Corporation
Altus Corporation
Plumbing Claims Group, Inc.
Celanese Canada, Inc.
Edmonton Methanol Company
Canadian Methanol Venture
Quidnick Reservoir Company
Japan/U.S. Venture Partners
Steuben Partners, L.P.
Venad IV L.P.
NPC Services, Inc.
MBW Ventures Limited
BHC Company
IB Chemical Company
RV Chemicals Limited

Nantong Cellulose Fibers Company Ltd.
Verniplast, S.A.
Ticona Polymer-werke GmbH
Hessische Industrieinuell Gmbh
CTE Petrochemicals Company
National Methanol Company
Tortuga Casualty Co.
United Insurance Company
Delta Holding, Inc.
Hopewell Insurance Company Limited
Celanese Mexicana S.A.
Resinas de Mexico S.A. de C.V.
Bodegas Industriales S.A. de C.V.
Servicasas S.A.
CelMex Marketing Company, Inc.
Comercializadora de Textiles de Export acion S.A. de C.V.
Promociones Sociales Mexicanas, S.C.
Polyplastics Co., Ltd.
Taiwan Engineering Plastics Company, Ltd.
HCPP Mexicana S.A. de C.V.
CelMex Centro americana, S.A.
Inducel S.A. de C.V.
Novacel, S.A. de C.V.
Derivados Macroquimicas, S.A. de C.V.
Univex, S.A.
Inmobiliaria Sercel, S.A. de C.V.

Church Heritage Village and Missionary Fellowship, property presently owned by New Heritage Carolina Corporation, a wholly owned subsidiary of New Heritage USA Corporation.

Crescent Land & Timber Corp., now known as Crescent Resources, Inc., a subsidiary whose ultimate parent is Duke Power Company. Directly or through wholly owned subsidiaries, Crescent Resources, Inc. has a partial ownership interest in the following entities:

Tyvola Crossing Associates Limited Partnership
Coliseum Associates Limited Partnership
Matthews Village Partners
200 Meeting Street Limited Partnership
Sparkleberry Land Joint Venture Partnership
Festival Associates Limited Partnership
Fort Mill Hotel Associates Limited Partnership
II Tryon Investment Trading Society
Gateway Associates Partnership
Gateway Associates II Limited Partnership
Norman Associates Partnership
Norman Associates II Partnership
Anitoch Center Limited Partnership
Battlewood Center Limited Partnership
Cashua Center Limited Partnership

Duke Power Company. In addition to the entities listed above with respect to its subsidiary Crescent Resources, Inc., through wholly owned subsidiaries Duke Power Company has a partial ownership interest in the following entities:

Black River Limited Partnership
Mecklenburg Cogeneration Partners, L. P.
Duke/Fluor Daniel General Partnership
Duke/Jones Hanford Inc.
Fort Drum Cogeneration General Partnership
Central Termica Guemes S. A.
Powerco S. A.
Powerco Services S. A.

Southern Railway Company (now known as Norfolk Southern Railway Company), a wholly owned subsidiary of Norfolk Southern Corporation. The subsidiaries of Norfolk Southern Corporation with securities outstanding in the hands of the public are:

Central of Georgia Railway Company
High Point, Randleman, Asheboro and
Southern Railroad Company
Mobile and Birmingham Railroad Company

Norfolk and Western Railway Company
The North Carolina Midland Railroad Company
The South Western Rail Road Company
State University Railroad Company
Virginia and Southwestern Railway Company
Yadkin Railroad Company

Springs Mills, Inc. (now known as Springs Industries, Inc.)

Tega Cay Associates (now known as The Point Wylie Co.)

Wachovia Bank and Trust Company (now known as Wachovia Bank of North Carolina, N.A.), a subsidiary whose ultimate parent is Wachovia Corporation.

Ashe Brick Company (now an unincorporated division of Boral Brick Inc.)

Nisbet Farms, Inc.

Ardrey Farms